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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT JEROME BECKLEY, JR., et al., Defendants and Appellants.	B212529 (Los Angeles County Super. Ct. No. TA094886)

APPEALS from judgments of the Superior Court of Los Angeles County. Arthur M. Lew, Judge. Affirmed as modified and remanded with directions.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant Albert Jerome Beckley, Jr.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant Darrell Amont Finn.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sarah J. Farhat and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts III, IV, V and VI.

In this opinion we hold that the prosecution's failure to authenticate a photograph and "gang roster" downloaded from internet web sites should have barred their admission but that the errors were harmless as to both defendants. We also conclude there was insufficient evidence to support the street gang enhancement of each defendant's sentence. We modify the judgments as to each defendant by striking the street gang enhancements. We further modify Finn's judgment by striking the gun use enhancements under Penal Code section 12022.53, subdivisions (b) through (d) and remand for resentencing. In all other respects, we affirm the judgments.

FACTS AND PROCEEDINGS BELOW

Following a jury trial, Albert Jerome Beckley, Jr., and Darrell Amont Finn were each convicted of one count of first degree murder and two counts of attempted premeditated murder. The jury also found true as to each defendant the gang-benefit enhancement allegations under Penal Code section 186.22, subdivision (b)[1] and the firearm use allegations under sections 12022.53, subdivisions (b), (c), and (d). The court sentenced each defendant to a term of 50 years to life consisting of 25 years to life for the murder and a consecutive 25 years to life for firearm discharge by a principal resulting in death during a gang-benefiting offense (§ 12022.53, subds (d) and (e).) Sentences on the remaining counts and enhancements were imposed to run concurrently or stayed.

We summarize the evidence in the light most favorable to the judgments.

In late April 2007, the Mahone brothers, Matthew and Jamal, attended a party in Compton where Jamal got into a fight. After the fight, Jamal agreed to meet his opponent for a rematch in Southside Park, a park claimed by the Southside Crips as their territory. About 50 people were waiting for Matthew and Jamal and their 20 to 25 friends when they arrived at the park. The fight lasted about nine minutes. Jamal lost. Afterward, Matthew fought with Beckley and knocked him out. The two groups then fought each other. When the fighting ended, Matthew considered the "problems" between him and the other group had been settled.

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1 All statutory references are to the Penal Code unless otherwise noted.

Approximately two weeks later, while walking home, Matthew saw Beckley and Finn near a liquor store. Beckley called out to Matthew, "Southside Compton Crips." Matthew walked away and did not respond. He knew Beckley and Finn only by their gang monikers, "Bluebird" and "Little Freaky."

On May 14, 2007, at approximately 7:30 p.m., Matthew and Jamal were standing outside their residence, within territory claimed by the Neighborhood Crips, a rival of the Southside Crips. Rene Duncan, Jerrica Allen and Andrew B., a minor, were also present. A car passed by twice before stopping in front of the house. The brothers spoke with the two female occupants of the car for a few minutes. The women accused the brothers of involvement in a club shooting the prior week. When the women asked Jamal his name and nickname, he responded, Jamal and Maleemal. After the women drove off, Matthew advised everyone to go inside because he thought they were being set up for a drive-by shooting.

Within minutes, a tan or silver car similar to the one driven by the woman drove by. Finn was the driver and Beckley, along with one or two others, was a passenger. Beckley, who was seated behind the driver, pulled himself partly out of the rear window and fired at Matthew, Jamal and Duncan from over the car's roof. Jamal died from a single gunshot wound to his chest. A bullet grazed Duncan's forehead and struck the side of her foot. Matthew was unharmed.

Detective Joseph Valencia, the People's gang expert, testified that Beckley and Finn were members of the Southside Compton Crips. In his opinion, this drive-by shooting was in retaliation for the earlier fight in the park and "directed at members of the Neighborhood Compton Crip street gang." Valencia also testified, however, that neither Mahone brothers was a member of the Neighborhood Crips. Another police officer testified at trial that Beckley admitted to him in April 2007, that he belonged to the Southside Compton Crips.

Finn fled to Seattle shortly after the shooting. He was in custody there on another matter when he was interviewed by Detective Brian Schoonmaker of the Los Angeles County Sheriff's Department. In the interview Finn admitted that he belonged to the

Southside Compton Crips and that he was known to his friends as Little Freaky. Finn also admitted that he was near the Mahone brothers' residence when he heard the gunshots on the night of May 14th and that he knew he was wanted for murder before he left for Seattle.

Finn did not testify.

Beckley presented a defense based on alibi and mistaken identity. He testified that he had been a Southside Compton Crips gang member but denied active membership after he began dating Kyeera Fulmore in February or March 2006. He stated that he knew Finn through working as a disc jockey at Finn's parties in Long Beach. He denied that Finn was a Southside Compton Crips gang member. Beckley also denied that he killed Jamal, had fought with Matthew at the park or had seen him at a liquor store.

Beckley's girlfriend, Fulmore, testified that Beckley babysat her two-year-old daughter at his Long Beach house while Fulmore attended classes at Camilla College from 4:00 p.m. until 10:00 p.m. Monday through Friday. She stated that she attended class the night of May 14th and presented documentary proof of her attendance. She denied associating with gang members and stated that when she began dating Beckley she insisted he stop "running with the [gang]" and was sure that he had complied with her demand. She further testified that she had never seen Beckley and Finn together.

Tiffany Garcia testified that immediately after the shooting she saw four or five individuals in a tan car. Someone she knew as "Brim," "Dossey," or "Dorsey," not Beckley, was the person in the back seat.

In rebuttal to Beckley's and Fulmore's testimony denying Beckley's gang involvement, Detective Schoonmaker testified regarding gang-related evidence he recovered from the MySpace.com internet accounts of Finn and Beckley

DISCUSSION

I. ADMISSIBILITY OF KYEERA FULMORE'S PHOTOGRAPH

To rebut Fulmore's testimony that she did not associate with the Southside Compton Crips and that she insisted Beckley stop his association with the gang, the prosecution offered a photograph purportedly showing Fulmore flashing the Southside

Compton Crips gang sign. Detective Schoonmaker testified that he downloaded the photograph from Beckley's home page on the internet website MySpace. The trial court admitted the photograph over both defendants' objections that it had not been authenticated. We agree with defendants that the court erred in admitting the photograph but we conclude that the error was harmless.[2]

A photograph is a "writing" and "[a]uthentication of a writing is required before it may be received in evidence." (Evid. Code, §§ 250, 1401, subd. (a).)

In *People v. Bowley* (1963) 59 Cal.2d 855, our Supreme Court established the two methods of authenticating a photograph. "It is well settled," the court stated, "that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence." (*Id*. at p. 859.) In addition, the court noted, authentication of a photograph "may be provided by the aid of expert testimony, as in the *Doggett* case, although there is no one qualified to authenticate it from personal observation." (*Id*. at p. 862.) In *People v. Doggett* (1948) 83 Cal.App.2d 405, the Court of Appeal upheld the admission of a photograph showing the defendants committing a crime. Because only the victim and the defendants, none of whom testified, were present when the crime took place and one of the defendants took the photograph, there was no one to testify that it accurately depicted what it purported to show. The People, however, produced evidence of when and where the picture was taken and that the defendants were the persons shown committing the crime. Furthermore, a photographic expert testified that the picture was not a composite and had not been faked. The court held this foundation sufficiently supported the photograph's admission as substantive evidence of the activity depicted. (*Id*. at p. 410.) Citing *Doggett* with approval, the Supreme Court held in *Bowley* that "a photograph may, in a proper case, be admitted into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows." (*People v. Bowley, supra*, 59 Cal.2d at p. 861.)

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[2] Our analysis is limited to whether the photograph was admissible to show that Fulmore associated with the gang and not to any other issue such as whether Beckley associated with gang members.

Although defendants conceded that the face in the MySpace photograph was Fulmore's, neither method of authentication recognized in *Bowley* qualified the photo for admission as accurately depicting that Fulmore had assumed the pose shown in the photograph. Schoonmaker could not testify from his personal knowledge that the photograph truthfully portrayed Fulmore flashing the gang sign and, unlike *Doggett*, *supra*, 83 Cal.App.2d at p. 410, no expert testified that the picture was not a "'composite' or 'faked'" photograph. Such expert testimony is even more critical today to prevent the admission of manipulated images than it was when *Doggett* and *Bowley* were decided. Recent experience shows that digital photographs can be changed to produce false images. (See e.g. *U. S. v. Newsome* (3d Cir. 2006) 439 F.3d 181, 183 [digital photographs used to make fake identification cards].) Indeed, with the advent of computer software programs such as Adobe Photoshop "it does not always take skill, experience, or even cognizance to alter a digital photo." (Parry, Digital Manipulation and Photographic Evidence: Defrauding The Courts One Thousand Words At A Time (2009) 2009 J. L. Tech. & Pol'y 175, 183.) Even the Attorney General recognizes the untrustworthiness of images downloaded from the internet, quoting the court's warning in *St. Clair v. Johnny's Oyster & Shrimp, Inc.* (S.D. Tex 1999) 76 F. Supp.2d 773, 775 that "'[a]nyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content of *any* web-site from *any* location at any time.'"

We cannot say, however, that the admission of the photograph prejudiced Beckley or Finn.

Beckley argues that the photograph of Fulmore flashing the Southside Compton Crips gang sign damaged the credibility of Fulmore's testimony that she did not associate with gangs and that, upon her insistence, Beckley had ceased involvement with the gang. He also argues that the photograph undercut the credibility of Fulmore's testimony in support of Beckley's alibi that he was babysitting Fulmore's daughter at his home on the night of the shooting.

These arguments lack merit for several reasons. Beckley's active membership in the Southside Compton Crips at the time of the shooting was not subject to reasonable doubt. He was part of the Southside Compton Crips group that fought with Jamal's and Matthew's group in the park a month before the shooting. He called out the gang's name in a challenge to Matthew approximately two weeks before the shooting and he admitted his gang affiliation to police as recently as a month before the shooting. In addition, Fulmore's testimony did not fully support Beckley's alibi. She testified that in the month of May 2007 Beckley babysat her daughter at his home every night she attended school and that she attended school on the night of the shooting from 4:00 p.m. until 10:00 p.m. She admitted on cross-examination, however, that because she was at school she had no personal knowledge whether Beckley was babysitting at the time of the shooting. Beckley's alibi was further weakened by evidence that he lived with his aunt and her children and that they were present most days when Fulmore dropped off her daughter. Beckley produced no evidence that his aunt was not at home the night of the shooting.

In contrast to the inconclusive evidence supporting Beckley's alibi, strong evidence supported his guilt. Matthew, an eyewitness to the shooting, who had fought Beckley in the park a month before the shooting and had been confronted by Beckley at the liquor store only two weeks earlier, identified Beckley as the shooter from a book of photographs of gang members shown to him by police five days after the shooting. He also identified Beckley as the shooter at trial. Andrew B., another eyewitness, aged 12 at the time of trial, identified Beckley as the shooter from a photo six-pack although at trial he denied seeing the shooter or identifying the shooter in the six-pack. Further, Beckley had a motive for the shooting—retaliation for his humiliating knock out at the hands of Matthew in the fight at the park.

Given the state of the evidence, it is not reasonably probable that Beckley would have been acquitted of the shooting if the court had not admitted Fulmore's picture flashing a gang sign.

Finn's claim of prejudice is even more attenuated than Beckley's. Finn reasons that the photograph purportedly showing Fulmore displaying the Southside Compton

Crips gang sign destroyed the credibility of her testimony that she wanted nothing to do with gangs and therefore the jury likely disbelieved her testimony that she had never seen Finn in the company of Beckley. Leaving aside the weak connection of her testimony to the question of whether Finn and Beckley spent time together, the record included undisputed evidence that they had spent time together. Beckley testified that he had worked as a disc jockey at two parties organized by Finn.

II. ADMISSIBILITY OF THE GANG ROSTER EVIDENCE

As evidence that the defendants belonged to the Southside Compton Crips, the prosecution offered a purported roster of the gang's members, including Beckley and Finn, which appeared on a web page that Detective Schoonmaker printed from the internet. The trial court admitted the evidence over the defendants' objections. Only Finn has pursued the admissibility of the roster on appeal. He argues that the roster was "unauthenticated" because there was no evidence as to who created it, what it was intended to represent, whether it did in fact represent what it was intended to represent, and whether its creator had any basis in personal knowledge for including the names on the list. [3]

The printout is presumed to be an accurate representation of the web page Detective Schoonmaker found on the internet. (Evid. Code, § 1552, subd. (a) ["A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent"].) The issue, however, was not whether the computer's printer could be trusted to reliably print out what was on the computer's screen or stored on some site but whether the content of what was on the site was reliable. We conclude that the evidence was insufficient to show that the writing was what it purported to be—a roster of the Southside Compton Crips. Therefore, the writing should have been excluded as

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[3] Finn does not address the question whether the web page should have been excluded as inadmissible hearsay. Therefore, we do not address that issue.

unauthenticated and, therefore, irrelevant. We further conclude, however, that the error was harmless.

The requirement that a writing be authenticated before it may be received into evidence (Evid. Code, § 1401, subd. (a)) is satisfied by "[i]ntroducing evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." As a leading treatise on evidence explains: "Before a writing may be admitted in evidence, its proponent must make a preliminary showing that the writing is relevant to an issue to be decided in the action. A showing of relevancy usually means proof that the writing is authentic . . . ." (1 Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) § 24.13, p. 386.) Without such proof the writing is irrelevant because it has no "tendency in reason" to prove or disprove a fact at issue in the case. (Evid. Code, § 210.)

Here, Schoonmaker claimed the writing was a roster of the members of the Southside Compton Crips. Schoonmaker admitted that he did not know who authored the roster but testified that he believed "that is a roster of Southside Compton Crip gang members that they themselves put together." This evidence was insufficient to authenticate the document as a roster of the Southside Compton Crips. Schoonmaker admitted that he did not know who created the list nor did he explain the basis for his assertion that the gang members "themselves put [it] together." Moreover, he offered no evidence that the person who created the list had any personal knowledge of the members of the gang or that the persons named in the list were current gang members. Accordingly, the court should have excluded the purported roster of gang members. The court's error, however, does not require reversal of Finn's conviction because the information contained on the list was cumulative. There was other evidence of Finn's membership in the gang, including his own admission, only one month before the shooting, made to police when interviewed in Seattle, and the testimony of Detective Valencia that Finn "has been seen and congregated with other members of this particular street gang." Evidence also showed that he had a body tattoo indicating affiliation with the gang.

III. ADMISSIBILITY OF PHOTOGRAPHS OF FINN IN SOUTHSIDE PARK

In order to rebut Beckley's testimony that he only knew Finn through working as a disc jockey at Finn's parties, the People introduced two photographs of groups posing in front of a tree in a park. Beckley admitted that he was in the front row in both pictures. Schoonmaker testified that Finn was standing in the back row in each picture and that the pictures were taken at Southside Park, Southside Crips' claimed territory. On cross-examination, Finn asked Schoonmaker how he knew that the photographs were taken at Southside Park. Schoonmaker responded that he had been to the park and recognized it from the layout of the houses in the background and the towers behind the houses. He further stated that he discussed the photographs with another detective who also recognized the park as Southside Park. The court overruled Finn's hearsay objection to what the other detective told Schoonmaker on the ground that Finn had opened the door by asking Schoonmaker how he knew that the park was Southside Park. Defendants contend that Schoonmaker's testimony concerning what another detective told him about the park was inadmissible hearsay and prejudicial. The Attorney General admits that the court erred in admitting Schoonmaker's testimony but denies that the error prejudiced either defendant. Whether error or not, we agree the testimony was not prejudicial.[4]

Beckley did not object to the admission of this evidence, nor did he join in Finn's objection. He therefore forfeited this claim of error on appeal. (*People v. Rogers* (1978) 21 Cal.3d 542, 547–548 ["questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground . . . urged on appeal"]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1656 [defendant unable to rely on codefendant's objections absent stipulation or understanding to this effect].)

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[4] It would appear that these photographs were subject to the same objection of lack of authentication as the purported photograph of Fulmore discussed in part I, *ante*. Nevertheless, that objection was not raised at trial and so we do not address it on appeal.

In any case, admission of this testimony was harmless. The information that the detective related to Schoonmaker was cumulative to Schoonmaker's own testimony that he had been to Southside Park and recognized it in the photographs.

IV. THE TRIAL COURT'S INTERJECTIONS AND OBJECTIONS DURING DEFENSE COUNSELS' EXAMINATION OF WITNESSES.

Defendants contend the trial court committed reversible error by interfering with defense counsels' examination of witnesses. They assign 15 instances involving Beckley's counsel and three involving Finn's counsel.

It is incumbent on the trial court "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) In furtherance of this duty, the court may object to questions asked by counsel (*People v. Sturm* (2006) 37 Cal.4th 1218, 1241), may interrupt proceedings in "cases of nonresponsive answers, immaterial questions, argumentative questions and poorly taken objections" (*People v. Candiotto* (1954) 128 Cal.App.2d 347, 359), and may "ask[] questions of a witness to clarify his testimony or to bring out some feature of his testimony in greater detail." (*Id*. at pp. 359-360.) In contrast, "[a] court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution. [Citations.]" (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206–1207.)

We find neither impropriety nor abuse.

The eight incidents during Beckley's counsel's examination of Adame, an eyewitness to the murder, each involved the trial court's proper intervention to maintain control of the trial. In the first instance, the court correctly ruled that because Adame had testified she did not see the gun's shape or color, the question whether Adame knew the difference between a revolver and a semi-automatic gun was irrelevant. The second concerned the court's refusal to allow counsel to testify regarding an exhibit he himself had prepared. In the third, the court correctly asked counsel to lay a foundation for the

chart about which he sought to inquire of Adame. The court interrupted in the fourth instance to correctly strike the witness's "totally ambiguous" response and to bar counsel from marking on an exhibit. The fifth assigned instance involved the court prompting counsel to rectify his omission to ask Adame to describe what she was pointing at and directing him to rephrase a vague and ambiguous question. The court's interruption in the sixth incident was necessitated by counsel's ambiguous reference regarding a photograph. In the next instance, the court sustained its own objection of lack of foundation when counsel asked if Adame had been planting grass on a "public way," which he did not define. In the final instance, Beckley's counsel acknowledged the objection to his question should be sustained for lack of relevancy. The court added the comment, "[a]lso calls for speculation," simply to clarify why the question sought irrelevant evidence.

The four incidents during examination of Matthew by Beckley's counsel also constituted justified judicial intervention. In the first, the trial court sustained its own objection and struck Matthew's answer on the grounds counsel's question was "vague and ambiguous in that he was "ask[ing Matthew] how he interprets his own conversation." In the next, the court was simply clarifying Matthew's response that "[b]y 'this car' [he was] referring to the pickup truck." The court in the third incident clarified that the witness said, "'it didn't come out" rather than 'it didn't come up'" and sustained its own objection to a question as vague and ambiguous. In the fourth incident, counsel asked if Matthew's memory would be refreshed if shown a police report to which the court responded, "There is nothing to refresh" and explained Matthew "said it didn't happen."

The final three incidents involved vague or ambiguous questions asked by Beckley's counsel. The court sustained its own objection to the following inquiry of Detective Valencia. "Now, there are various different definitions of members of a gang; correct? I mean, there's more than just being a gang member. There are the older gang members, the newer gang members, and so on; right?" Next, when counsel asked Beckley how it happened that he was "DJ'ing when [he] joined," the court directed

counsel to rephrase the question, because it was "somewhat ambiguous." In the last incident, counsel asked Schoonmaker, "Anything on that site, Beckley's—what you said Mr. Beckley's site, had to be logged in no later than July of 2006; correct?" The court directed counsel to rephrase the question and "be more specific rather than say to login, because logging in means one thing. To upload something means something else. And to download something means something else."

The three instances involving Finn's counsel's examination of Adame also did not amount to misconduct. In the first, confusion arose concerning what letter a particular defense exhibit should be marked for identification. When Beckley's counsel offered the letter "E," the trial court clarified it was letter "F," which Finn's counsel confirmed. The next instance involved the trial court's efforts to assist Adame who had difficulty demonstrating the direction where she was looking when she saw the shooter. The remaining incident reflects the court's effort to move the trial along. When Finn's counsel asked Adame if she were "changing [her] testimony now" about her house being directly across the street from the Mahones' house, the court responded it thought "her testimony was 'more or less,'" which response Finn's counsel accepted.[5]

V. THE GANG BENEFIT ENHANCEMENTS

The trial court imposed and stayed gang enhancements as to each defendant under section 186.22, subdivision (b)(1)(C). Defendants challenge the sufficiency of the evidence to sustain the enhancements. They contend the prosecutor failed to prove that the Southside Compton Crips are a "criminal street gang" within the meaning of section 186.22, subdivisions (b)(1) and (f) because there is insufficient evidence that one of the gang's primary activities is a crime listed in section 186.22, subdivision (e). Defendants further contend that the prosecutor presented no evidence that the defendants knew of the alleged primary activities of the Southside Compton Crips.

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[5] Because we find no error in the way the court conducted the trial we need not address Finn's contention that his trial counsel was ineffective in not objecting to the court's interruptions.

Whether the record contains sufficient evidence of defendants' *knowledge* of these individuals' activities and the pattern of criminal gang activity is irrelevant to the gang-benefit enhancement under section 186.22, subdivision (b)(1). Defendants confuse the elements of that enhancement with the elements of the crime of actively participating in a criminal street gang under section 186.22, subdivision (a). "The statutory elements of the criminal street gang crime and the criminal street gang enhancement are disparate. 'Any person who *actively participates* in any criminal street gang *with knowledge* that its members engage in or have engaged in *a pattern of criminal gang activity*, and who *willfully promotes, furthers, or assists* in any felonious criminal conduct by members of that gang' commits the criminal street gang crime. (§ 186.22, subd. (a), italics added.) In contrast, 'any person who is convicted of a felony committed *for the benefit of, at the direction of, or in association with* any criminal street gang, *with the specific intent to promote, further, or assist* in any criminal conduct by gang members' is punishable by the criminal street gang enhancement. (§ 186.22, subd. (b), italics added.) So a person can commit the crime of first degree murder with a criminal street gang enhancement without necessarily committing the criminal street gang crime." (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1095–1096.)

We agree, however, that the evidence is insufficient to prove that one of the gang's primary activities is a crime listed in section 186.22, subdivision (e).

"To trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities." (*Id*. at p. 323.) Expert testimony may provide "[s]ufficient proof of the gang's primary activities[, which] might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id*. at p. 324, italics in original.) "The substantial evidence standard of review applies to section

186.22 gang enhancements. [Citations.]" (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

The only evidence of the gang's "primary activities" came from Detective Valencia, the People's gang expert, who testified that his gang assignment specifically included the investigation of the Southside Compton Crips and that he was familiar with many of its over 200 documented members, including Beckley. The prosecutor asked Valencia: "What are some of the primary activities of the Southside Compton Crip gang?" Valencia answered: "Their crimes are murder, assault with deadly weapons, shooting at inhabited dwellings, robberies, vehicle thefts, thefts with people [sic], narcotic sales, illegal weapons possession."

This testimony was insufficient to establish the "primary activities" element of the street gang enhancement. Not only did Valencia's answer fail to identify the gang's *primary* activities but, as in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, "[n]o specifics were elicited as to the circumstances of these crimes, or where, when, or how [Valencia] had obtained the information.

Our reversal of the street gang enhancement as to Finn also requires us to strike the firearm enhancements as to Finn under section 12022.53, subdivisions (b) through (d). Finn was the driver, not the shooter. Under subdivision (e) of section 12022.53 the enhancements under subdivisions (b) through (d) do not apply to a principal who does not personally and intentionally discharge a firearm unless the gang enhancement under section 186.22, subdivision (b) also applies.

VI. CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS

Finally, defendants contend that even if the trial court's errors were harmless considered individually, reversal is warranted based on cumulative error. We disagree.

"Having carefully reviewed the whole record before us in the light of [appellants'] claims, we are persuaded that any errors, singly or in combination, were harmless beyond a reasonable doubt [citation] and that because it is not reasonably probable that a result more favorable to [appellants] 'would have been reached in the absence of the error'

[citation], no miscarriage of justice has occurred (Cal. Const., art. VI, § 13)." (*People v. Redmond* (1981) 29 Cal.3d 904, 914; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 ["The few errors that occurred during defendant's trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one."].)

DISPOSITION

The sentence of each defendant is modified by striking the street gang enhancement. Finn's sentence is further modified by striking the gun use enhancements under Penal Code section 12022.53, subdivisions (b) through (d) and remanded for resentencing. The causes are remanded to the trial court with directions to prepare amended abstracts of judgment and to forward corrected copies thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.